In the Supreme Court of the United States

OCTOBER TERM, 1930.

No.....

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE, TREASURER OF TRUMBULL COUNTY, OHIO, successor in office and substituted as party defendant for Frank F. Musser, Former Treasurer of Trumbull County, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Trumbull County, Ohio, and

BRIEF IN SUPPORT OF PETITION.

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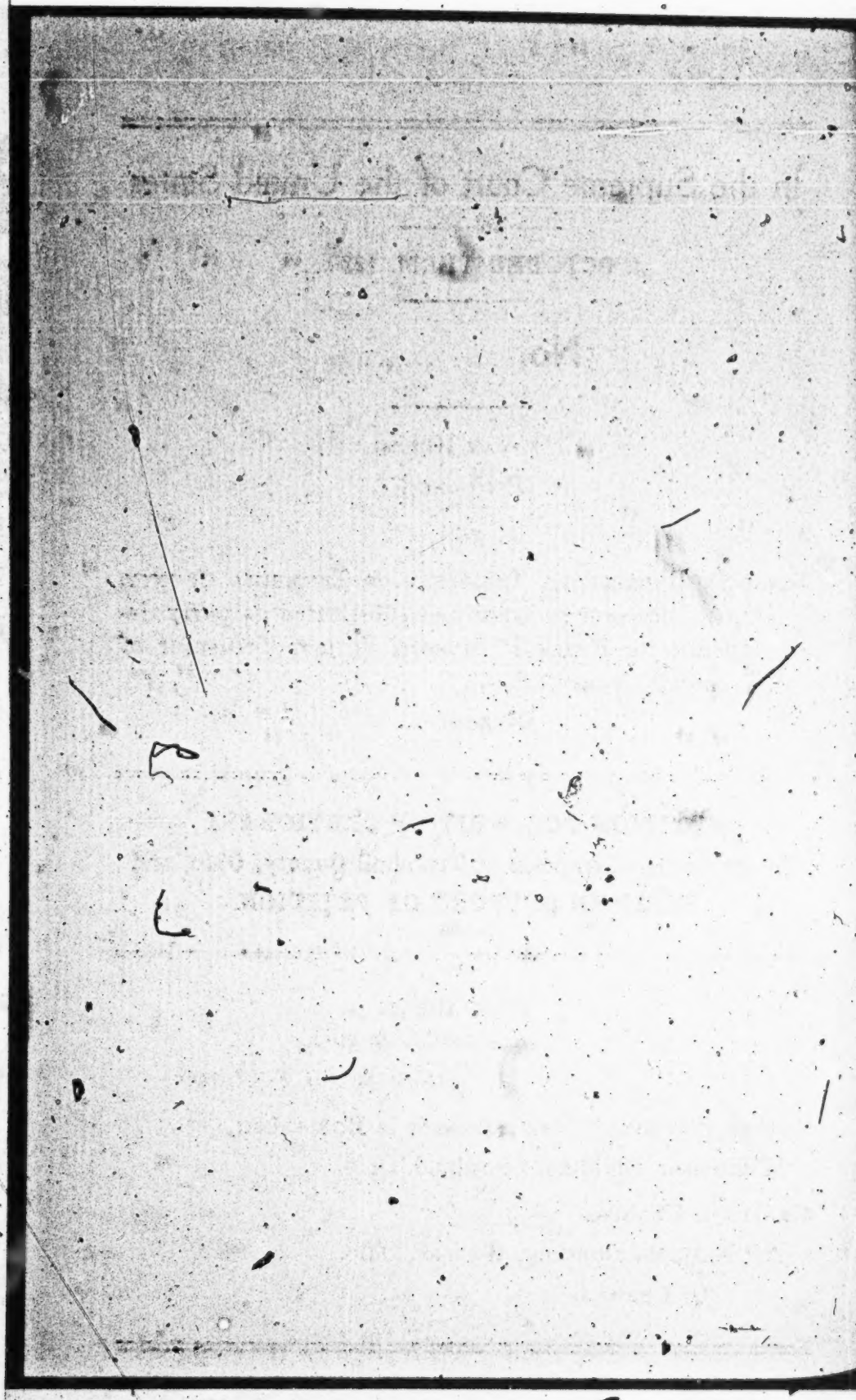

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1. In a proceeding in a court of bankruptcy to sell and marshal liens, to which the Treasurer of Trumbull County, Ohio, is made a party and in which he appears and sets up his tax lien, has the court the power and jurisdiction to order the bankrupt's real estate sold free and clear of the lien of the Treasurer of Trumbull County, Ohio, for taxes due the county and state, and, by the same order, transfer such lien from the property to the fund to be derived from the sale thereof? 22

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Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Trumbull County, Ohio.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of I. J. Van Huffel respectfully shows unto this Honorable Court:

A.
SUMMARY STATEMENT OF MATTERS INVOLVED.

This is an action to quiet the title (R. 1) of petitioner to certain real estate owned by him and of which he is in possession, against the claim (R. 3) of the respondent, who claims a lien thereon for taxes, penalty and interest due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927. By way of reply (R. 5) to respond-

ent's answer, in which respondent set up his lien, petitioner set forth the fact that the real estate now owned by him was formerly owned by The Sterling-Knight Company, which, during its ownership thereof, was declared a bankrupt, and petitioner, after further setting forth at length certain proceedings had in the bankruptcy court to marshal liens upon such real estate (R. 5), to which proceedings respondent was a party and in which he appeared (R. 6), averred that the lien of the respondent had been fully adjudicated in the Bankruptcy Court of the United States for the Northern District of Ohio, Eastern Division, and that respondent now had no lien upon the premises described in his petition for taxes for the years 1924, 1925, 1926 and 1927. The Court of Appeals of Trumbull County, Ohio, found and determined (R. 26) that the District Court of the United States for the Northern District of Ohio, Eastern Division, sitting in bankruptcy, had no jurisdiction, power or authority to adjudicate the lien of the respondent for taxes, or to transfer the lien of the respondent from the property to the fund to be derived from the sale thereof, and that notwithstanding such adjudication in the Bankruptcy Court, respondent still had a valid lien on the premises for taxes for the years 1924, 1925, 1926 and 1927. The Supreme Court of Ohio denied petitioner's motion therein filed for an order directing the Court of Appeals of Trumbull County, Ohio, to certify thereto its record for review, and likewise dismissed petitioner's petition in error therein filed as of right (R. 28).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Petitioner purchased the real estate herein involved free and clear of the lien asserted by respondent for taxes for the years 1924, 1925, 1926 and 1927 (R. 24), relying upon an order (R. 22) of a federal bankruptcy court directing the sale thereof free from such lien. This order was made in a proceeding which was then pending in the United States District Court for the Northern District of Ohio, Eastern Division, to marshal liens, in which respondent was named as a defendant (R. 20), of which he was notified as required by the federal bankruptcy act (R. 20), and in which he appeared and asserted his lien. (R. 22) The finding of the bankruptcy court (R. [illegible]) that respondent's lien was a third lien on the real estate involved, and its order that such lien be transferred from the property to the fund to be derived from the sale thereof, and that such property be sold free and clear of encumbrances, have never been modified, vacated or reversed. (R. 26) The finding and judgment of the Court of Appeals of Trumbull County, Ohio, that the federal bankruptcy court had no jurisdiction (R. 26) or power to transfer respondent's tax lien from the property to the fund to be derived from the sale thereof, or to order a sale of such property free from respondent's tax lien, place a construction upon Article 1, Section 8, paragraph 4 of the Constitution of the United States and upon the federal bankruptcy statutes which is wholly untenable. The precise question has never been before this Court, so far as counsels' research has disclosed, although the power, jurisdiction and authority of the bankruptcy court to order sales of real estate free and clear of encumbrances, including tax liens, has been up-

held by numerous decisions of the various United States Circuit Courts of Appeal and District Courts.

2. The Court of Appeals of Trumbull County, Ohio, failed to give full faith and credit to a judgment and decree of a court of the United States, rendered in a cause of which the court of the United States had exclusive jurisdiction of the subject matter, in which respondent was named as a defendant, notified as required by law and in which he appeared and asserted the same lien he now asserts.

3. The finding and judgment of the Court of Appeals of Trumbull County, Ohio, cast a cloud upon the title of purchasers who heretofore have purchased property under an order of the bankruptcy court ordering the same sold free and clear of encumbrances. They act as a deterrent to the future sales of property in bankruptcy which bankruptcy courts might order to be made free and clear of encumbrances, and thus give rise to an important question of federal law which has not been but should, it is submitted, be settled by this Court.

4. The finding and judgment of the Court of Appeals of Trumbull County, Ohio, fail to protect and, in fact, deny the title, right, privilege and immunities which your petitioner claims under the constitution and statutes of the United States.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Trumbull County, Ohio, commanding that court to certify and send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket No. 613, I. J. Van Huffel,

Plaintiff v. Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, substituted party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio, Defendant, and that the decree and judgment of the Court of Appeals of Trumbull County, Ohio, be reversed by this Honorable Court, and that of the Common Pleas Court of Trumbull County, Ohio, in cause No. 28,887 upon its docket, entitled I. J. Van Huffel, Plaintiff, v. Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, substituted party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio, Defendant, be affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

I. J. VAN HUFFEL,
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Of Counsel.

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TRACE D. HARKELRODE, TREASURER OF TRUMBULL COUNTY, OHIO, Successor in office and substituted as party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio.

Respondent.

BRIEF OF PETITIONER

In Support of Petition for Writ of Certiorari.

I.

THE OPINIONS OF THE COURTS BELOW.

The written opinion of the Court of Appeals of Trumbull County, Ohio, is not reported, but is set forth at length in the record on page 13. No written opinions were rendered by the Supreme Court of Ohio or by the Common Pleas Court of Trumbull County, Ohio.

II.

JURISDICTION.

1. Section 344 of Title 28, U. S. C., (Judicial Code Section 237, amended) provides:

"(a) . . .

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it

for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein * * * any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *

"(c) * * *"

Section 350 of Title 28, U. S. C., provides:

"No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, * * *."

2. This proceeding was instituted in the Common Pleas Court of Trumbull County, Ohio, on the 23rd day of March, 1929. (R. 1.) The Common Pleas Court of Trumbull County, Ohio, rendered final judgment for your petitioner on the 28th day of March, 1930. (R. 10.) Upon appeal by respondent to the Court of Appeals of Trumbull County, Ohio, judgment was entered for the respondent on the 17th day of September, 1930. (R. 19.) Within thirty days and on the 14th day of October, 1930, petitioner filed in the Supreme Court of Ohio both a petition in error (R. 27) as of right (Section 12270 of the General Code of Ohio), claiming a constitutional question to be involved, and a motion for an order requiring the Court of Appeals of Trumbull County, Ohio, to certify thereto its record for review. (Rule VIII, Section 1, 113 O. S. lxxiii.) Petitioner's petition in error filed in the Supreme Court of Ohio as of right was dismissed (R. 28), and petitioner's motion for an order directing the Court of Appeals of Trumbull County, Ohio,

to certify to the Supreme Court of Ohio its record for review was overruled (R. 28) on the 24th day of December, 1930. On the 16th day of January, 1931, and within the time limited by law therefor (Rule XX, Section 1, 113 O. S., lxxxvi), petitioner filed in the Supreme Court of Ohio an application for rehearing (R. 28), both as to his petition in error filed as of right and his motion for an order requiring the Court of Appeals of Trumbull County, Ohio, to certify thereto its record for review. This application for rehearing was denied by the Supreme Court of Ohio on the 7th day of February, 1931 (R. 29), and thereupon the judgment of the Court of Appeals of Trumbull County, Ohio, became the final judgment of the highest state court in which a judgment in this cause could be had, unless it can be said that the filing by petitioner, in the Supreme Court of Ohio, of a transcript of the record of the proceedings had in the Court of Appeals. (R. 27), which petitioner was required to do at the time of filing therein his petition in error (Section 12263 of the General Code of Ohio), resulted in the rulings of the Supreme Court of Ohio, herein above referred to, becoming the final judgment of the highest state court in which a judgment in this cause could be had.

3. The suit below was one on behalf of petitioner to quiet title to certain real estate, which he owned and of which he was in possession, against the claim of the respondent, who claimed a lien thereon for taxes due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927. (R. 1) By way of reply (R. 5) to respondent's answer to petitioner's petition, in which answer respondent set up his claim (R. 3), petitioner averred that the real estate now owned by him was formerly owned by The Sterling-Knight Company, an Ohio corporation, which at the time of its ownership thereof was declared a bankrupt by the District Court of the United States for the Northern District of Ohio, Eastern Division; that one H.

B. Doyle was subsequently elected and he duly qualified as the Trustee in Bankruptcy of The Sterling-Knight Company; that as such Trustee he filed, with the District Court of the United States for the Northern District of Ohio, Eastern Division, his petition to marshal the liens upon such real estate, to determine their validity and priority, and praying for an order of sale thereof, free and clear of liens; that respondent was made a party defendant to such proceedings, was duly notified thereof as required by law and filed his answer therein, setting up his lien for taxes due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927; that the District Court of the United States for the Northern District of Ohio, Eastern Division, determined respondent's lien for taxes to be a third lien upon the real estate, and transferred the same, as well as the liens of other lienholders, from the property to the fund to be derived from the sale thereof, and directed the Trustee in Bankruptcy to sell the same at public sale, free and clear of all liens and encumbrances, including the lien of respondent; that pursuant to such order the Trustee in Bankruptcy sold said premises at public sale, free and clear of all liens including the lien of the respondent; that petitioner claims title to the premises so sold by mesne conveyances from the purchaser at such sale and pursuant to and under the terms of such decree of the District Court of the United States for the Northern District of Ohio, Eastern Division; that the order of such court is still in full force and effect, has never been vacated, modified or reversed, and that the same fully adjudicated the right of respondent, and that by reason thereof the respondent now has no right, title, interest, claim to or lien upon the premises described in petitioner's petition for taxes due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927. The Court of Appeals of Trumbull County, Ohio, held and determined that the

Bankruptcy Court of the United States for the Northern District of Ohio, Eastern Division, was wholly without jurisdiction, power or authority (R. 26) to transfer respondent's tax lien from the premises to the fund to be derived from the sale thereof, or to extinguish the lien of respondent and that consequently such lien was still a lien thereon, which the respondent was authorized to enforce in the manner prescribed by the statutes of the State of Ohio. (R. 26) Thus the title, right, privilege and immunity of petitioner, claimed under the constitution and statutes of the United States, set forth and pleaded in petitioner's reply to the respondent's answer, was denied by the Court of Appeals of Trumbull County, Ohio. Under the provisions of Section 344 of Title 28, U. S. C. *supra*, it is respectfully submitted that this Court has jurisdiction to review such judgment.

4. The following cases sustain the jurisdiction of this Court to review the judgment of the Court of Appeals of Trumbull County, Ohio:

Diepasseur v. Rocherean, 21 Wall. 130;
Embry v. Palmer, 107 U. S. 3, 9;
Factors etc. Insurance Co. v. Murphy, 111 U. S. 738;
New Orleans Spanish Fort & Lake R. R. Co. v. Delamore, 114 U. S. 501;
Traer v. Clews, 115 U. S. 528;
Crescent City etc. Co. v. Butchers Union etc. Co., 120 U. S. 141;
Pendleton v. Russell, 144 U. S. 640;
Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Long Island Loan & Trust Co., 172 U. S. 493;
National Foundry & Pipe Works v. Oconto City Water Supply Co., 183 U. S. 216.

In *Myers v. International Trust Co.*, 263 U. S. 64, at page 69, the late Chief Justice said:

"The case here turns on the effect of the bankruptcy record and so presents a federal question whether full faith and credit was given to the judgment of the federal court."

In *Supreme Lodge v. Meyer*, 265 U. S. 30, it was said:

"While proceedings in Federal courts are not within the terms of Article IV, Sec. 1 of the Constitution, they nevertheless must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another state."

5. The court will observe that petitioner has filed two petitions for writs of certiorari. The reason for so doing is that counsel for petitioner have been unable to ascertain under the peculiar circumstances of the case as to which state court the writ of certiorari, if granted, should be directed by this Court. Upon receiving an adverse decision in the Court of Appeals of Trumbull County, Ohio, petitioner filed, in the Supreme Court of Ohio, as is common practice, both a motion for an order directing the Court of Appeals to certify thereto its record for review, and a petition in error as of right, claiming a constitutional question to be involved. (R. 27) Article IV, Section 2 of the Constitution of Ohio provides that the Supreme Court:

"* * * shall have * * * appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, * * *. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the court of appeals."

A certified transcript of the record of the proceedings had in the Court of Appeals of Trumbull County, Ohio, was not filed in the Supreme Court of Ohio, nor was it required to be filed, at the time petitioner filed therein his motion

for an order directing the Court of Appeals to certify thereto its record for review; though such record was filed, (R. 27) and was required to be filed, in the Supreme Court of Ohio at the time petitioner filed therein his petition in error as of right.

Section 12263 of the General Code of Ohio provides:

> "With his petition, plaintiff in error shall file either a transcript of the final record, or a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of. * * *"

Had no petition in error been filed in the Supreme Court of Ohio, then in view of the denial by the Supreme Court of Ohio of petitioner's motion to certify, the writ of certiorari of this Court, if granted, would have to be directed to the Court of Appeals of Trumbull County, Ohio.

Second National Bank v. First National Bank, 242 U. S. 600;
American Railway Express Co. v. Levee, 263 U. S. 19;
Matthews v. Huwe, 269 U. S. 262;
Minneapolis, St. P. & S. Ste. M. R. Co. v. Rock, 279 U. S. 410.

Had no motion to certify the record been filed in the Supreme Court of Ohio, then in view of the fact that that court dismissed petitioner's petition in error upon the grounds that no debatable constitutional question was involved, quaeri whether this Court would have any jurisdiction upon writ of certiorari, the petitioner not having exhausted all of his remedies in the state courts. *Matthews v. Huwe, supra.* If this Court did have jurisdiction under such circumstances, then its writ for certiorari, if granted, would have to be directed to the Supreme Court of Ohio. *Matthews v. Huwe, supra.* In the instant case where both a motion to certify and a petition in error were filed in the

Supreme Court of Ohio, counsel for petitioner were fearful that if they requested a writ for certiorari to be granted, directed to the Supreme Court of Ohio, then, if the same were granted and in view of the fact that petitioner's petition in error filed in the Supreme Court of Ohio was dismissed upon the ground that there was no debatable constitutional question involved, the only question which counsel would be permitted to raise in this Court would be whether or not any constitutional question was involved. Counsel for petitioner do not desire to be so restricted in the questions which the record presents, but desire to raise in this Court, should their petition be granted, the questions of general law presented by the record, as well as the constitutional question. Therefore two petitions for writs of certiorari have been filed, one asking that the writ, if granted, be directed to the Supreme Court of Ohio and the other asking that the same, if granted, be directed to the Court of Appeals of Trumbull County, Ohio. At the time of filing each petition certified copies of the record were filed, one certified by the Clerk of the Supreme Court of Ohio and the other by the Clerk of the Court of Appeals of Trumbull County, Ohio.

III.

STATEMENT OF THE CASE.

Petitioner filed his action below under favor of Section 11901 of the General Code of Ohio, which provides as follows:

> "§11901. *Action to quiet title.*—An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; or such action may be brought by a person out of possession, having, or claiming to have an estate or interest in remainder or reversion in real property,

against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

In his petition filed below (R. 1) petitioner alleged that he was the owner of, and was in possession of, the real estate described in his petition, and that the respondent claimed an estate or interest therein adverse to the petitioner, and he prayed that respondent be compelled to answer, setting up his interest, or be forever barred, and that upon final hearing his title might be quieted as against any and all claims of respondent. To this petition the respondent filed an answer (R. 3) claiming certain taxes to be due him as Treasurer of Trumbull County, Ohio, for the years 1924, 1925, 1926, 1927, 1928 and 1929. Taxes for the years 1928 and 1929 are not here in dispute. As to the taxes which the respondent claimed for the years 1924, 1925, 1926 and 1927, the petitioner by way of reply (R. 5) to respondent's answer, and, after averring and setting forth at length certain proceedings had in the District Court of the United States for the Northern District of Ohio; Eastern Division, sitting in bankruptcy, averred that respondent's lien for taxes for such years had been fully adjudicated in such bankruptcy proceedings, and that they now were not a lien upon petitioner's real estate, and that by reason of the proceedings had in the District Court of the United States for the Northern District of Ohio, Eastern Division, respondent had no claim, right to or lien upon such real estate for taxes for the years 1924, 1925, 1926 and 1927. The Court of Appeals of Trumbull County, Ohio, made a finding of fact (R. 19) separate and apart from its conclusions of law. (R. 26) The facts are not in dispute. The error herein complained of arises over the first conclusion of law made by the Court of Appeals of Trumbull County, Ohio, which is as follows:

"The Bankruptcy Court had no power or jurisdiction to relieve the real estate belonging to the bankrupt estate of The Sterling-Knight Company from the taxes which, with penalty and interest had accrued at the time the real estate was ordered to be sold, and consequently taxes due to the Treasurer of Trumbull County, Ohio, for the years 1924, 1925, 1926 and 1927, plus penalty and interest, are still a lien upon the real estate described in plaintiff's petition, which can be collected in the manner authorized by the laws of the State of Ohio." (R. 26)

IV.

SPECIFICATIONS OF ERROR.

It is respectfully submitted that the facts as found by the Court of Appeals of Trumbull County, Ohio, do not support its judgment, in that:

1. The District Court of the United States for the Northern District of Ohio, Eastern Division, in the bankruptcy proceedings of The Sterling-Knight Company, did have the power and authority to transfer the tax lien of the respondent from the real estate of The Sterling-Knight Company to the fund to be derived from the sale thereof, and did have the power and authority to order the sale of such real estate free and clear of all encumbrances, including the tax lien of the respondent.

2. The Court of Appeals of Trumbull County, Ohio, failed to give full faith and credit to the judgment and decree of the District Court of the United States for the Northern District of Ohio, Eastern Division, in the bankruptcy proceedings of The Sterling-Knight Company, to which respondent was named as a party defendant, of which he was notified as required by law and in which he appeared and set forth the same tax lien which he now seeks to assert against the property of petitioner.

V.

UNITED STATES CONSTITUTIONAL, STATUTORY PROVISIONS AND GENERAL ORDERS INVOLVED.

Article I, Section 8, paragraph 4, of the Constitution of the United States provides:

> "The Congress shall have power * * * to establish uniform laws on the subject of bankruptcies throughout the United States."

Section 1, Title 11, U. S. C. (Section 2 of the Bankruptcy Act) provides:

> "The courts of bankruptcy * * *, namely, the district courts of the United States in the several states, * * * are hereby invested * * * with such jurisdiction at law or in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to
>
> (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;
>
> (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;
>
> (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;
>
> (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;
>
> (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title;
>
> Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power

it would possess were certain specific powers not herein enumerated."

Section 45, Title 11, U. S. C. (Section 22 of the Bankruptcy Act) provides:

"(a) After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specifically with only limited authority to act in the premises or to consider and report such specified issue; * * *."

Section 53, Title 11, U. S. C. (Section 30 of the Bankruptcy Act) provides:

"All necessary rules, forms, and orders as to procedure and for carrying the provisions of this title into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

General Order XII provides:

"1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; * * *. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

General Order XVIII provides:

"1. All sales shall be by public auction unless otherwise ordered by the court."

General Order XXVII provides:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Section 66, Title 11, U. S. C. (Section 38 of the Bankruptcy Act) provides:

> "Referees respectively are invested, subject always to a review by the judge, * * * with jurisdiction to * * * (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this title conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; * * *."

Section 75, Title 11, U. S. C. (Section 47 of the Bankruptcy Act) provides:

> "Trustees shall * * * (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; * * *."

Section 94, Title 11, U. S. C. (Section 58 of the Bankruptcy Act) provides:

> "(a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of * * * (4) all proposed sales of property; * * *.
>
> "(c) All notices shall be given by the referee, unless otherwise ordered by the Judge."

Section 104, Title 11, U. S. C. (Section 64 of the Bankruptcy Act) provides:

"Debts which have priority. (a) The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments, the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court.

"(b) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estate, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankruptcy in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses

of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

Section 110, Title 11, U. S. C. (Section 70 of the Bankruptcy Act) provides:

"The trustee of the estate of a bankrupt, * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * *."

Section 687 of Title 28, U. S. C., provides:

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

ARGUMENT.

1. In a proceeding in a court of bankruptcy to sell and marshal liens, to which the Treasurer of Trumbull County, Ohio, is made a party and in which he appears and sets up his tax lien, has the court the power and jurisdiction to order the bankrupt's real estate sold free and clear of the lien of the Treasurer of Trumbull County, Ohio, for taxes due the county and state, and, by the same order, transfer such lien from the property to the fund to be derived from the sale thereof?

The finding of the Referee in Bankruptcy, (R. 8, 23), that the lien of the respondent for taxes was a third lien upon the real estate in question, might have been erroneous. The lien for taxes assessed against real estate is usually held to be the first lien thereon, and such taxes are usually ordered to be first paid out of the proceeds of any judicial sale. It was the lien of the United States filed by C. F. Routzahn, Collector of Internal Revenue, which confused the referee. The latter lien was one for manufacturer's excise tax (R. 22) which was not filed for record with the Recorder of Trumbull County until August 10, 1925 (R. 22), long after the mortgagees had procured their mortgage lien. (R. 22) Section 115, Title 26, U. S. C., provides:

> "(a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property * * *.
>
> "(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—
>
> "(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; * * *."

Under this Section of the Code the lien of C. F. Routzahn, Collector of Internal Revenue, was admittedly a third lien, being subsequent to the mortgage liens of The Union Trust

Company, Trustee, and The Old Dominion Mortgage Company. Section 104, Title 11, U. S. C., (page 20 *supra*) (Section 64 of the Bankruptcy Act), provides that taxes due the United States, state, county, district or municipality are of equal priority and the referee could not see how, in view of this provision of the Bankruptcy Act, he could give the Treasurer of Trumbull County a first lien and C. F. Routzahn a third lien. So he found that all taxes were a third lien. Perhaps he had in mind that there were general funds from which the taxes might have been paid, if proper application therefor had been made. But the fact that the referee's finding might have been erroneous does not warrant the conclusion that the bankruptcy court was without power or jurisdiction to make the order it did make.

In *Lessee of Paine v. Mooreland*, 15 O. 435 at 445, it is said:

> "A court, then, may act, first, without power or jurisdiction, second, having power or jurisdiction, may exercise it wrongfully; or, third, irregularly. In the first instance, the act or judgment of the Court is wholly void, and is as though it had not been done. The second is wrong, and must be reversed upon error. The third is irregular, and must be corrected by motion. The latter is where the power is rightfully exercised, but in an irregular way. Hence there is a vast distinction between a defect of power, a wrongful exercise of power, and an irregular exercise of power."

It is the position of counsel for petitioner that at most the bankruptcy court acted erroneously and, its error not having been corrected by proper error proceedings, its finding is now final and conclusive. It was simply an *erroneous* decision.

The claim of the respondent is based upon Section 5671 of the General Code of Ohio, which provides as follows:

> "§5671. *When lien of state for taxes attaches.*— The lien of the state for taxes levied for all purposes,

in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. * * *"

This Section of the General Code of Ohio can have no bearing upon the question here presented for the power and jurisdiction of the bankruptcy court is derived from and defined by the acts of Congress and not the legislative enactments of Ohio or of any other state.

It must be admitted that by virtue of Article I, Section 8, paragraph 4 of the United States Constitution, (page 17 *supra*) which authorizes Congress to establish an uniform bankruptcy law, the bankruptcy laws enacted pursuant thereto are paramount to any state laws upon the same subject, and that when the *state laws* in any wise *conflict* with the bankruptcy laws, the latter prevail. *International Shoe Company v. Pinkus*, 278 U. S. 261. *In re Moore*, 42 F. (2nd) 475.

The bankruptcy act enacted pursuant to this provision of the Constitution authorizes the bankruptcy court to refer the administration of bankrupt estates to referees, either generally or for some specific purpose. Section 45, Title 11, U. S. C. (page 18 *supra*) (Section 22 of the Bankruptcy Act). General Order in Bankruptcy XII, (page 18 *supra*) promulgated by the Supreme Court of the United States, pursuant to Section 53, Title 11, U. S. C. (page 18 *supra*) (Section 30 of the Bankruptcy Act), provides that when a case is referred to the referee

"all proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

Section 66, Title 11, U. S. C. (Section 38 of the Bankruptcy Act) provides:

"Referees respectively are invested, subject always to a review by the judge, * * * with jurisdiction

to * * * (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this title conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; * * *."

There is no requirement in the bankruptcy act or in the general orders that sales of the bankrupt's property can be ordered only by the judge, and consequently, in view of the finding by the Court of Appeals that the bankrupt estate here under consideration was referred (R. 19) to the referee for administration, he had the authority, if any one had it, to order the sale in question and to marshal liens.

There is nothing to be found in the Bankruptcy Act, which expressly authorizes the court to sell the property of the bankrupt free and clear of all liens or of any specific lien, or which requires the court to sell the property of the bankrupt subject to all liens or to any specific lien. But inasmuch as Section 1, Title 11, U. S. C. (page 17 *supra*) (Section 2 of the Bankruptcy Act) invests bankruptcy courts with such jurisdiction at law *or in equity* as will enable them to exercise original jurisdiction in bankruptcy proceedings, to

"(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

* "(6) *bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;* (Italics ours.)

"(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

"(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title."

and further, inasmuch as Section 75, Title 11, U. S. C. (page 19 *supra*) (Section 47 of the Bankruptcy Act) requires trustees in bankruptcy to collect and reduce to money the property of the bankrupt, it has been held times without number that a bankruptcy court can sell the property of the bankrupt free and clear of all liens, or subject to liens, or free from some liens and subject to others, transferring the liens from the property to the fund to be derived from the sale thereof.

People's Homestead Association v. Bartlette, 33 F. 2d. 561 (C. C. A. 5th Circuit);

In re Danville Hotel Co., 33 F. 2d. 162 (District Court, Illinois);

In re Gish, 32 F. 2d. 322 (District Court, Kentucky);

In re Macklem, 28 F. 2d. 417 (District Court, Maryland);

In re Southern Florida Realty Corporation, 16 F. 2d. 171 (District Court, Florida);

In re Gimbel, 294 Fed. 883 (C. C. A. 5th Circuit);

Gantt v. Jones, 272 Fed. 117 (C. C. A. 4th Circuit);

In re Franklin Brewing Co., 249 Fed. 333 (C. C. A. 2nd Circuit);

In re Reading Hat Mfg. Co., 224 Fed. 786 (District Court, Pennsylvania);

In re National Boat & Engine Co., 216 Fed. 208 (District Court, Maine);

Cf. Whitney v. Wenman, 198 U. S. 539;

Murphey v. Hofman Co., 211 U. S. 562.

In *Gantt v. Jones*, 272 Fed. 117, the court said:

"1. The power of a bankruptcy court to order a sale of the bankrupt's property free from liens is not expressly conferred but is necessarily implied, as such sale is often necessary to the due execution of the power and duty to reduce the assets to money and distribute it to creditors.

In *In re National Boat & Engine Company*, 216 Fed. 208, the court said:

"1. Under the broad powers conferred by Bankruptcy Act July 1, 1898, c. 541, Section 2 (7) 30 Stat. 546, (U. S. Comp. st. 1901, p. 3421) to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, when property has thus become subject to a court of bankruptcy, jurisdiction exists to pass on questions relating to its disposition and to determine the extent and character of liens thereon and rights therein, and to that end to bring in and substitute additional parties whenever necessary for a complete determination of the matter in controversy.

"2. As a consequence of the power of a court of bankruptcy to order the sale of property of a bankrupt free of liens, it has jurisdiction to determine the validity, extent and relative priority of liens on the proceeds which stand as a substitute for the property sold, and in proceedings for the distribution of such fund, the trustee should appear and protect the rights of the estate."

And such power can be exercised even though the lien claimant objects. *In re Gimbel, supra; In re Franklin Brewing Co., supra.*

In *In re Loveland*, 155 Fed. 838 (C. C. A. 1st Circuit), it was held that the order of sale could be issued without first determining the amount or the validity of the liens.

True it is that the bankrupt estate acquires no greater title than the bankrupt itself had and that it takes title

subject to all such liens and encumbrances as are not avoided by the bankruptcy laws, but the property having passed into the hands of a court of bankruptcy the *remedy* of lien claimants is alone affected. As was said by the court in *In re Reading Hat Mfg. Co.*, 224 Fed. 786:

> "A trustee in bankruptcy succeeds by operation of law to the title of the bankrupt; but liens and incumbrances, not avoided by the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544), remain unaffected, except so far as the remedy of enforcement is limited by the property having passed into the custody of the court."

By reason of the provisions of Section 94, Title 11, U. S. C. (page 19 *supra*) (Section 58 of the Bankruptcy Act), creditors are entitled to at least ten days' notice by mail of all proposed sales of property. By reason of the finding of fact of the Court of Appeals with respect to the notices given in the instant case (R. 20), the validity of the order of the bankruptcy court cannot be questioned upon that ground.

In all of the cases above cited, in which property was ordered sold free and clear of encumbrances, the particular question here involved, to-wit, whether such order can be made as against the lien of a state for taxes was not passed upon or decided. It would seem, however, that inasmuch as a bankruptcy court must of necessity be authorized to sell property free and clear of *all* encumbrances, when the sale of the property in that form will, in the opinion of the bankruptcy court, be of greater benefit to the bankrupt's estate than such sale would be if made subject to encumbrances, there is no reason, either at law or in equity, why that doctrine should alone apply to lien claimants other than the Government, state or county. Certainly they are each as necessary a party as any other lien claimant to a complete determination of the question of the

legality, amount and priority of the liens upon the bankrupt's property, a question which the bankruptcy court must determine in order to know whether such property should be abandoned, because there is no equity therein for the general creditors, or whether the bankruptcy court should exercise the jurisdiction that it has over such property and dispose of it, either subject to encumbrances or free from encumbrances.

In *The Dollar Savings Bank v. United States*, 19 Wall. 233, at 239, the court said:

> "It is a familiar principle that the King is not bound by any Act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. *Magdalen College* case, 11 Coke, 74; *King v. Allen*, 15 East, 333. He may even take the benefit of any particular Act, though not named. Case of a *Fine Levied, etc.*, 7 Coke, 32; *Pott. Dwarris*, 151, 152. The rule thus settled respecting the British crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal Courts. It may be considered as settled that so much of the royal prerogative as belonged to the King in his capacity of *parens partiae*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution."

See also

United States v. Herron, 20 Wall. 253;
Lewis v. United States, 92 U. S. 618.

The doctrine of the above cases was recognized in *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, wherein the United States was held subject to the bankruptcy act because named therein. The court said on pages 159 and 160:

"It will be seen, therefore, that by the statute of 1797 (now §3466) and §5101 of the Revised Statutes, all debts due to the United States were expressly given priority to the wages due any operative clerk, or house servant. A different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality.' These were civil obligations, not personal conventions, and preference was given to them; but as to debts, we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. *The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment.* The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants." (Italics ours)

In *In re General Film Corporation*, 274 Fed. 903 (C. C. A. 2nd Circuit) in which the question of income taxes due to the federal government was involved, the court said at page 904:

"The government's first proposition is that the only remedy open to the trustee for correcting any error is to pay the taxes and then proceed under Rev. Stat. 3226 (Comp. St. 5949) by appeal to the Commissioner of Internal Revenue and, if the Commissioner delay decision for more than six months, to bring suit. But Congress in the Bankruptcy Act of 1898 (Comp. St. §§9585-9656) has departed very considerably from the principles of public policy theretofore prevailing as to the rights of the sovereign. The Supreme Court pointed this out in *Guarantee Title & Trust Co. v. Title*

Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706.

"Section 64a of the Bankruptcy Act reads:

"'The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.' Comp. St. §9648.

"We regard this section as binding upon the government because it is named therein and, while conferring priority, as giving the bankruptcy court the power to hear and determine any question that arises as to the amount or legality of a tax assessed by it. The provision applied *to taxes of all the persons mentioned*, and we could not differentiate the government from the other persons in the absence of language justifying it." (Italics ours)

In *In re Anderson*, 279 Fed. 525 (C. C. A. 2nd Circuit), in which the trustee in bankruptcy served a motion and a petition upon the Collector of Internal Revenue for the Second District of New York, returnable before the referee, wherein the trustee prayed for an order barring and foreclosing the United States from participating in the bankrupt's estate, or in the alternative be directed to file its claim or claims on or before a day certain in order that a hearing thereon might be had in accordance with law, the United States appeared specially and moved to dismiss the trustee's petition upon the grounds that the bankruptcy Court was without jurisdiction and that service upon the Collector of Internal Revenue was not service upon the United States. These

objections were overruled, the hearing was had and the referee barred the United States from participating in the bankrupt estate, which order was affirmed upon review by the District Court. From such affirmance by the District Court the United States filed its petition to review in the United States Circuit Court of Appeals. The court said on page 529:

> "The United States must file its claim for taxes, as any other creditor, if it desires to share in the estate, and the court must determine any question arising as to the amount or legality of such tax. It cannot stand by, as it did here, after permission having been granted to file its claim, and expect to subsequently collect the tax from the bankrupt or his trustee. To permit such a procedure would make it impossible to say when there could be a winding up of the bankruptcy proceedings and a distribution of the assets. The trustee may only pay out the assets under an order of the referee or the court, and without such order he could not pay the income tax owing to the government. If the government had a priority, it could be easily determined in this proceeding, and it clearly was the intention of Congress that it should be determined under the command of section 64a, where the United States is specifically mentioned. We think it was the intention to have settled promptly in the bankruptcy proceedings all matters of taxes due the United States. The Bankruptcy Act evidently does not contemplate that taxes should be proved, like an ordinary debt, providing, as it does, that they shall be paid by the trustee on order of the court, and that he shall have credit in his accounts upon filing receipts from the proper officials therefor. *In re Prince & Walter* (D. C.) 131 Fed. 546.
>
> "We think the trustee properly initiated these proceedings by making the collector of internal revenue a party. * * * The court granted 10 days after the service of a copy of the order within which to move to dispute the merits of the finding of the referee below.

This was not taken advantage of and the time has expired. We think the government cannot complain as to the exercise of discretion.

"The order below, barring the United States from participating in the estate, must be affirmed."

In *In re Brezin*, 297 Fed. 300 (District Court, New Jersey), the court recognized the validity of the doctrine announced in the *Anderson* case, *supra*, but held that, because the United States was not specifically mentioned in that section of the Bankruptcy Act which provides that claims could not be proved subsequent to one year after the adjudication, the United States had the right to prove its claim after the year had expired. The doctrine in the *Anderson* case, *supra*, was likewise recognized in the cases of *United States v. Wood*, 290 Fed. 109 (C. C. A. 2nd Circuit); *In re Sheinman*, 14 F. 2nd 323 (District Court of Pennsylvania); *United States v. Bernstein*, 16 F. 2nd 233 (C. C. A. 8th Circuit). See also *Nisbett v. Trust Company*, 229 Fed. 644, 649 (C. C. A. 8th Circuit).

What is true of the sovereign United States must likewise be true of the sovereign States, for Section 104, Title 11, U. S. C. (pages 20, 21, *supra*) (Section 64 of the Bankruptcy Act) provides:

"The term 'person' as used in this Section shall include corporations, the United States and the several States and Territories of the United States * * *"

and indeed it has been so held.

In *In re Florence Commercial Co.*, 19 Fed. 2d. 468, (C. C. A. 9th Circuit), certiorari denied 275 U. S. 542, the Treasurer of Pinal County, Arizona, acting under the statutes of that state, seized a stock of merchandise of the Florence Commercial Company to enforce the payment of tax claims for the years 1921 to 1926, aggregating $9,139.34.

Five days later the Florence Commercial Company was adjudged a bankrupt and thereafter the trustee in bankruptcy filed an application with the court for a show cause order to be served upon the County Treasurer of Pinal County, Arizona, to the end that upon a hearing the validity and amount of the tax claims might be determined and the trustee in bankruptcy authorized to sell the property free and clear of liens. In reply to the show cause order the Treasurer of Pinal County, Arizona, filed a special answer in the nature of a plea to the jurisdiction of the bankruptcy court. The court, with respect to Section 104, Title 11, U. S. C., (Section 64 of the Bankruptcy Act), said, 19 Fed. 2d. 469:

> "It is not controverted that the 'court' here referred to is the bankruptcy court, and that the hearing and determination provided for are to be had, not in a plenary suit, but in a summary proceeding such as we are considering. That Congress has the power to confer the requisite jurisdiction upon the bankruptcy court is not open to doubt. *In re Wood*, 210 U. S. 246, 28 S. Ct. 621, 52 L. Ed. 1046. Has it exercised that power? In effect, if not in terms, appellants argue that the section ceases to be operative or is inapplicable where, as here, the tax-collecting agency, in proceedings to force payment, acquires possession of the taxed property prior to bankruptcy. But this view cannot be taken without reading into the general language an unexpressed exception, inconsistent with both its letter and its spirit."

In *In re Stavin*, 12 F. 2d, 471 (District Court, New York), certain wage creditors who were entitled to priority of payment were seeking to obtain the payment of their claims upon the grounds that there was sufficient money to pay their claims in full. The referee, before ordering such claims paid, desired to ascertain the amount of *taxes due to the State of New York and to the United*

States. For this purpose the referee, within five months from the date of adjudication, served upon the State of New York and the United States Government an order requiring them to file, within sixty days after the service of such order, any and all claims which they had against the bankrupt's estate. The trustee in bankruptcy thought this order was erroneous in that the year within which creditors could prove their claims had not as yet expired, with the result that the referee in bankruptcy certified the question to the District Court for review. It might be added that neither the State of New York nor the United States put in any appearance in response to the show cause order. The District Court in passing upon the question so certified to it said:

"Under section 64a of the Bankruptcy Act (Comp. St. §9648), the bankruptcy court is required to pass upon and determine the amount and the validity of taxes claimed to be owing by the bankrupt to the state and to the United States. *In re General Film Corporation* (C. C. A.) 274 F. 903; *In re [illegible]erson* (C. C. A.) 279 F. 525; *In re Brezin* (D. C.) 297 [illegible]00; *In re Wyley Co.* (D. C.) 292 F. 900. Inasmuch as this section expressly provides that the court shall order the trustee to pay such taxes 'in advance of the payment of dividends to creditors,' the intention is clear that all sums due for taxes should be promptly ascertained and determined before the first dividend is declared.

"Section 65b (Comp. St. §9649) contemplates payment of a first dividend within 30 days after the adjudication, provided the estate is in funds sufficient to pay priority debts and a dividend of 5 per cent. But under section 64a taxes legally due and owing by the bankrupt must first be determined and ordered paid. For this purpose the bankruptcy court may by proper *notice bring the state and the United States before it,* to the end that claims for all taxes legally due and owing may be ascertained and their validity deter-

mined. In the *Anderson* case, *supra*, this was done by an order similar to the orders here in question. Such orders are proper, and clearly within the jurisdiction of the court in the exercise of its power under section 64a. * * *"

In *In re Prince & Walter*, 131 Fed. 546, (District Court, Pennsylvania), in which was involved the question of the proper distribution of funds derived from the sale of the bankrupt's real estate, the court said, at page 549:

"But it is urged that by the thirty-second section (page 375) of the act the taxes are made a continuing lien on the property, notwithstanding a sale, unless the proceeds are sufficient to pay them, and that they should not fare any differently or better in the bankruptcy court than they would elsewhere, and should therefore be left to be worked out against the property in the hands of the purchaser; the municipalities to which they are due being abundantly secured thereby. *In re Veitch*, 4 Am. Bankr. Rep. 112, 101 Fed. 251. *In re Brinker* (D. C.) 128 Fed. 634; *City of Waco v. Bryan* (C. C. A.) 127 Fed. 79 (dissenting opinion of Shelby, *J.*). But it is not correct to assume that the lien of the taxes continues notwithstanding the sale which has been made. No doubt they would if the matter was regulated purely by the state law. But notwithstanding what has been said above about liens being unaffected by bankruptcy proceedings, it is in the power of the court to order a sale free and clear of them, regardless of how they would ordinarily stand. *In re Keet*, 11 Am. Bankr. Rep. 117, 128 Fed. 651. And the court having undertaken to administer upon the real estate in the present instance, and directed a sale subject to the lien of the first mortgage, all others were thereby divested; and any one who purchased upon the faith of this, as disclosed by the record, took a clear title, on which nothing further can be imposed."

Counsel for respondent no doubt will contend, as they contended below, that the only jurisdiction of the Bankruptcy Court under Section 104, Title 11, U. S. C., (Section 64 of the Bankruptcy Act), is to determine the amount or legality of the taxes, in case any question as to the amount or legality thereof arises, and that in the case at bar no question arose before the Bankruptcy Court as to the amount or legality of respondent's tax claim. The record does not disclose whether or not the legality or amount of respondent's tax claim was in any wise contested, but certainly the provisions of the Bankruptcy Act are not to be given such narrow construction, for under Paragraph (b) of the Section, the Bankruptcy Court must determine the priority of tax claims, as well as determine their amount and legality under Paragraph (a). As was said by the Court in *In re Florence Commercial Co.*, 19 Fed. 2d. 468, at 470, certiorari denied 275 U. S. 542:

> "Nor are we inclined to the narrow view that, while there may be jurisdiction to determine the amount of the tax, it does not extend to the incidental matter of the tax lien. The bankruptcy court is to see to it that the estate fully discharges all legal obligations in respect of taxes; and accordingly it is invested with power to decide all questions incidental to the performance of that duty."

It is respectfully submitted that the above authorities clearly establish the jurisdiction of bankruptcy courts to determine the priority of tax liens upon the bankrupt's real estate and to order such real estate sold free and clear thereof, transferring the liens from the property to the fund to be derived from the sale thereof, and that the Court of Appeals of Trumbull County, Ohio, erred in finding and holding that the Bankruptcy Court had no such jurisdiction. It was in the performance of this jurisdic-

tion, that the Bankruptcy Court, in the bankruptcy proceedings of The Sterling-Knight Company, probably committed error in finding that respondent's tax lien was the third lien upon the real estate of the bankrupt, and on the funds to be derived from the sale thereof. To correct this error the law provided the respondent with a remedy. Under Section 66, Title 11, U. S. C. (page 19, *supra*) (Section 38 of the Bankruptcy Act), and under General Order in Bankruptcy No. XXVII (page 18, *supra*) the respondent could have obtained a review of the rulings of the referee. He failed to take advantage of such remedy, and, it is submitted, he is now bound by the judgment of the Bankruptcy Court.

2. The Court of Appeals of Trumbull County, Ohio, failed to give full faith and credit to the judgment and decree of the District Court of the United States.

The District Court of the United States for the Northern District of Ohio, Eastern Division, sitting in bankruptcy, having had jurisdiction, power and authority to make the order which it did make, it was the duty of the Court of Appeals of Trumbull County, Ohio, under Section 687, Title 28, U. S. C. (page 21, *supra*) to give full faith and credit thereto. *Supreme Lodge v. Meyer*, 265 U. S. 30.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the judgment and finding of the Court of Appeals of Trumbull County, Ohio, may be reversed and the right, title, privilege and immunities claimed by petitioner under the statutes of the United States may be protected, and that to such an end a writ

of certiorari should be granted and this Court should review the decision of the Court of Appeals of Trumbull County, Ohio, and finally reverse it.

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